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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-388

THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Petitioner,*

v.

ROY G. ALLMAN, TRUSTEE, ET AL., *Respondents.*

THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Petitioner,*

v.

THOMAS R. WILLIAMS, ET AL., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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JURISDICTION

espondents submit this Court lacks jurisdiction to ew the subject decisions of the Supreme Court of ginia under Title 28, United States Code, Section (3), in that there is no federal constitutional issue

nor any controlling federal question as discussed in Arguments I and II, *infra,* at pages 10-33 and 33-36, respectively.

QUESTIONS PRESENTED

(1) WHETHER THE DECISIONS OF THE SUPREME COURT OF VIRGINIA IN *Allman* AND *Williams* ARE GROUNDED IN THE VIRGINIA CONSTITUTION AND IN VIRGINIA STATUTES.

(2) WHETHER, ASSUMING THE GROUNDS OF DECISION ARE UNCLEAR, THE DECISIONS SHOULD BE HELD TO REST ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

(3) WHETHER, ASSUMING FEDERAL GROUNDS OF DECISION, THE DECISIONS LIE IN AREAS OF TRADITIONAL STATE CONCERN AND, FURTHER, WHETHER THEY TURN ON THEIR PARTICULAR FACTS AND CIRCUMSTANCES AND THUS PRESENT NO QUESTION OF GENERAL IMPORTANCE SUFFICIENT TO BE WORTHY OF CERTIORARI.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents respectfully submit that the Fourteenth Amendment to the United States Constitution was not involved in the decision of the court below. That court's decision was, and this Court's review should be, limited to:

Va. Const., Art. I, § 1, Appendix *infra* at 1a,
Va. Const., Art. I, § 8, Appendix *infra* at 1a-2a,
Va. Const., Art. I, § 11, Appendix *infra* at 2a,
Va. Code Ann., § 15.1-486, Appendix *infra* at 2a-3a,
Va. Code Ann., § 15.1-488, Appendix *infra* at 3a;
Va. Code Ann., § 15.1-489, Appendix *infra* at 3a-4a,
Va. Code Ann., § 15.1-510, Appendix *infra* at 4a.

STATEMENT OF THE CASE

The Board of Supervisors of Fairfax County herein seeks review by this Court of two Supreme Court of Virginia opinions[1] affirming separate decisions of the Circuit Court of Fairfax County which invalidated denials by the Board of certain rezoning applications filed by individual owners of private property.

Allman submitted his application (C-222) to the Board in January and July 1971, seeking rezoning from RE-1 (residential, one dwelling unit per acre) to PDH-3 (planned development residential, approximately three units per acre). After denial by the Board, Allman instituted a declaratory judgment ac-

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[1] *Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 211 S.E.2d 48 (1975). For the sake of consistency and brevity the following shortened references will be utilized in this Brief in Opposition. Petitioner Board of Supervisors of Fairfax County will be "the Board" or "the Petitioner"; Respondent Roy G. Allman, Trustee, and the other parties of interest who brought suit against the Board will be "Allman"; the Opinion in the Supreme Court of Virginia and the Record therein will be "*Allman*" or "*Allman* App."; the property which was the subject of Allman's Rezoning Application C-222 will be "the Allman tract" or "the subject property".

Board of Supervsors of Fairfax County v. *Williams*, 216 Va. 49, 216 S.E.2d 33 (1975). *Williams* involves suits filed on two separate denials of rezoning by the Board, one by Williams, et al. and one by Van Metre, et al. These cases were consolidated for trial and on appeal, and will be treated herein as one case. Respondent Thomas R. Williams and all other parties of interest including those in the Van Metre case who brought suit against the Board will be "Williams"; the Opinion from the Supreme Court of Virginia and the Record therein will be "*Williams*" or "*Williams* App."; the property which was the subject of both rezoning applications will be "the Williams tract" or "the subject property". Throughout this Brief in Opposition the Supreme Court of Virginia will be "the court below" or the "Supreme Court of Virginia". The Circuit Court of Fairfax County will be "the trial court" or "the Circuit Court of Fairfax County".

tion in the Circuit Court of Fairfax County seeking to have the RE-1 zoning on his property declared "arbitrary and capricious and without reasonable relation to the public health, safety, or general welfare," and to have the Board's denial of his application declared "illegal, null, and void."

The trial court, in an Order entered on July 23, 1973, found, *inter alia,* that other actions of the Board were inconsistent with its denial of Allman's application, that Allman had been subjected to discrimination which resulted in a deprivation of substantial property rights, and that the denial of Application C-222 was arbitrary and capricious and not reasonably related to the public health, safety, and welfare.[2]

The Board refused to reconsider Allman's application despite the findings of the trial court and a court Order directing reconsideration. Upon expiration of the time provided for Board reconsideration, the trial court rezoned the property in accordance with its findings.

The Board noted an appeal from both actions of the trial court. At trial and in the Supreme Court of Virginia the Board's principal argument in support of the Allman denial was an alleged inadequacy of public facilities.

The Allman property had been comprehensively planned since 1963 for the very density requested by C-222.[3] The record established the PDH-3 category was more beneficial to the County than traditional zoning categories and was preferred by the Board.[4]

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[2] *Allman* App., Vol. I at 11.

[3] *Id.*, Vol. III at 30-35.

[4] 211 S.E.2d at 53; *Allman* App., Vol. III at 44; Stipulated Exhibit 3 at 44, 50, 98.

The Supreme Court of Virginia, with a detailed examination of the record,[5] found as a fact that adequate public facilities were available or would be available by the time Allman began development, a fact confirmed by one of the Board members during the Allman public hearing. The Court further found that the Clinch, Hiddenbrook, Reston, and several other properties in Allman's immediate vicinity had been granted rezonings to higher densities during the pendency of the Allman application even though they impacted on these same "inadequate" public facilities.

The Supreme Court of Virginia found the Board's denial of the Allman application to be "inconsistent and discriminatory," and that it was therefore "arbitrary and capricious" and bore "no reasonable or substantial relation to the public health, safety, or general welfare." Contrary to Petitioner's assertion, at no point did the court tie that finding into a finding of economic preference or discrimination.

Williams submitted his application (C-169) to the Board in July, 1970, seeking rezoning from RE-1 to R-12.5 (residential, 2.9 dwelling units per acre). Williams was forced to file a mandamus action in the Circuit Court of Fairfax County in order to obtain a public hearing on his application; the Board had refused to hear certain rezoning requests while granting preferential status and public hearings to others. Williams resorted to the trial court a second time to force a decision on his application when the Board, after holding the initial court-ordered hearing, merely deferred the application for another eight months. The

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[5] 211 S.E.2d at 49-53. This Court's attention is directed to Allman's Brief of Appellee (hereafter "Allman's Brief"), pp. 3-20, where a detailed Statement of Facts is based upon specific Appendix (Record) references.

Williams application was ultimately denied on November 20, 1972, in a second court-ordered hearing.

Williams then filed his motion for declaratory judgment in the Circuit Court of Fairfax County seeking invalidation of the RE-1 zoning on the subject property because it was "arbitrary, capricious and without reasonable relation to the public health, safety, morals and general welfare." The action also sought to have the Board's denial declared illegal, null and void.

The trial court held RE-1 zoning on the subject property was unreasonable, arbitrary, and capricious, and also found that public facilities were or soon would be available to serve the land in question, that nearby similarly situated property had already been rezoned for higher density use, that existing zoning of the land in question was unreasonable and therefore invalid, and that the denial of higher density zoning was discriminatory.[6]

On appeal, the Supreme Court of Virginia addressed the same two issues addressed by the trial court: (1) Whether certain public facilities, namely highways, schools, and sewage disposal were available to serve the land in question, and (2) Whether the Board's denial of the rezoning requests was discriminatory.[7] The court below found the record supported each and every one of the findings of the trial court.[8]

The Board's main defense of its rezoning denial was again a claimed inadequacy of public facilities, which it argued in conjunction with the Middle Run Policy (adopted in 1969 for a subdistrict of Fairfax County's Pohick Planning District), a policy against develop-

[6] 216 S.E.2d at 36, 39; *Williams* App., Vol. I at 28.
[7] 216 S.E.2d at 35.
[8] 216 S.E.2d at 39-40.

ment in the Middle Run until after 1975. The Supreme Court found that the factual underpinnings of the Board's reliance upon the Middle Run Policy failed with the findings of the trial court that adequate facilities were available or would be available by the time of development.[9] The court below, in finding inconsistency and discrimination, focused upon the Board's use of the Middle Run Policy as a "sword" to permit development of 41% of the property in the Middle Run area and, relying upon the Policy's timing provisions, use of it as a "shield" to justify denial of similar treatment to other Middle Run properties similarly situated.[10]

The Supreme Court of Virginia found the Board's use of the Middle Run Policy to differentiate between similarly situated properties was discriminatory since "no demonstrated real difference" distinguished the various properties and "justified granting preferred status to one property while denying it to another." The court concluded this resulted in "the same type discriminatory practice described as arbitrary and capricious" in *Allman*. The court below further found the Board's large-lot zoning policies had the discriminatory effect of excluding "from portions of Fairfax County those persons who do not have the 'substantial means' to 'afford to move into the County'." [11]

At no point in its decision did the Virginia Supreme Court hold this discriminatory action "violated the Equal Protection Clause." It did find the "holding zone" technique had not specifically been authorized by

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[9] 216 S.E.2d at 40.
[10] 216 S.E.2d at 41.
[11] *Id.*

statute. The record reflects the Board's awareness of this lack of authorization at the time it adopted the Middle Run Policy.

Petitioner is herein asking this Court to overturn substantial findings of fact and law by both a trial and an appellate court in the face of a record which refutes the Board's arguments and proferred version of the facts.

SUMMARY OF ARGUMENT

I. The decisions of the Supreme Court of Virginia were grounded in the Virginia Constitution and in Virginia statutes. Both opinions hold the actions of the Board of Supervisors were "discriminatory," were "arbitrary and capricious," and bore "no reasonable or substantial relation to the public health, safety, morals, or general welfare."

State courts have developed a body of state constitutional law by which they review uses of state police power. Sometimes based on state due process clauses, sometimes on more general precepts of the limits of the police power, these state standards exist independently of federal law.

Virginia, like the other states, has evolved state constitutional doctrines which its courts have used regularly to measure exercises of the police power generally and the zoning power specifically. In applying these standards, Virginia courts ask whether actions are "discriminatory," "arbitrary and capricious," or "unreasonable"—the standards applied in *Allman* and *Williams*.

The two opinions were also grounded in Virginia statutes. The enabling acts delegating the police and

zoning powers to Virginia counties require those powers to be exercised to promote the "health, safety, and general welfare." In *Allman* and *Williams* the Board's actions were found to bear "no substantial relation to the public health, safety, morals, or general welfare" —language based in the statutes.

The *Allman* and *Williams* opinions were grounded in yet another Virginia statute, one requiring uniformity in zoning regulations. This statute had been applied in another Virginia decision, which in turn was used by the court in the instant cases in upholding findings of discrimination.

Opinions so firmly grounded in state law raise no question of federal law appropriate for review in this Court.

II. The decisions of the Supreme Court of Virginia rest on adequate and independent state grounds. Even assuming the decisions below are ambiguous as to their grounds—and they are not—there is in the opinions not even a scintilla of a federal ground of decision. There is an obvious basis for the decisions in Virginia law. The adequate state ground doctrine calls for the Court to decline jurisdiction.

III. Even assuming, *arguendo,* the decisions below implicated federal constitutional standards, *Allman* and *Williams* are tied to their peculiar facts and circumstances. As such, they are not worthy of certiorari.

In the first place, zoning law is notably dependent on state law and standards. Secondly, decisions on rezoning applications are by their nature ad hoc, turning

on the facts of each case. Thirdly, these cases are bound up in the particular circumstances of Fairfax County, including changes in membership on the Board of Supervisors and consequent changes in policies.

In short, resolution of these two cases, tied as they are to Virginia law and Fairfax issues, can be of little help in guiding courts in other states. Assuming (contrary to the fact) a Fourteenth Amendment aspect to the decisions below, it is hardly worth Supreme Court review to decide whether the particular facts found by the Virginia courts in necessarily ad hoc proceedings were such as to permit a conclusion that, on those facts, the Fourteenth Amendment was violated.

ARGUMENT

I. The Decisions of the Supreme Court of Virginia in *Allman* and *Williams* Were Grounded in the Virginia Constitution and in Virginia Statutes

Certiorari does not lie in this case unless Petitioner can show, as required by 28 U.S.C. § 1257(3), that the "validity of a State statute is drawn in question on the ground of its being repugnant to the [Federal] Constitution. . . ." If the decisions in *Allman* and *Williams* rest on grounds of Virginia law, this Court lacks jurisdiction and the petition for writ of certiorari must be dismissed.

A reading of the *Allman* and *Williams* opinions, and a comparison of those opinions with the Virginia Constitution, with Virginia statutes, and with Virginia cases developing and applying those constitutional and statutory standards, makes abundantly clear that the opinions are indeed based upon Virginia law, both constitutional and statutory.

The operative paragraph of the *Allman* decision is short (211 S.E.2d at 55):

> Allman has overcome the presumption of legislative validity that attached to the action of the Board in reaffirming a RE-1 classification for his land. His evidence established a course of action by the Board that was inconsistent and discriminatory. A discriminatory action is an arbitrary and a capricious action, and bears no reasonable or substantial relation to the public health, safety, morals or general welfare. The reasonableness of the Board's action is not fairly debatable, and it will not be sustained.

Similar language appears in the *Williams* decision (216 S.E.2d at 41):

> The effect of the application of the Board's Middle Run policies was to discriminate between similarly-situated property. In the present case, the discrimination was specifically and dramatically directed at the land in question. While hearing and granting other rezoning requests in the Middle Run area, the Board refused even to consider the present requests until forced by court action to hear the applications. But more important, the land in question extensively borders or is nearby other property already zoned for higher-density use. No demonstrated real difference distinguishes the various properties and justifies granting preferred status to one property while denying it to another. This is the same type discriminatory practice described as arbitrary and capricious and therefore condemned in *Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 211 S.E. 2d 48 (1975).

The congruence of the two opinions becomes even more apparent when the Court in *Williams* concludes

that the discrimination there "is the same same type discriminatory practice" condemned in *Allman*.[12]

The key to both decisions therefore is an understanding of what grounds, constitutional or otherwise, underlie the Virginia Court's language of "discrimination," of "arbitrary and capricious," of actions bearing "no reasonable or substantial relation to the public health, safety, morals, or general welfare."

Petitioner would have this Court read the Virginia decisions as resting on the Fourteenth Amendment. Petitioner argues that "discrimination" must mean Fourteenth Amendment equal protection and that, in fashioning its standards for review of Fairfax County's exercise of its delegated police powers in this case, the Virginia Court was using Fourteenth Amendment due process. So to argue betrays a woeful misunderstanding of a vast body of state constitutional doctrine upon which state courts, both in Virginia and the states at large, have drawn to use due process and other clauses in state constitutions to strike down discriminatory acts by government. Petitioner's argument also ignores the extent to which Virginia zoning decisions, both those now before this Court and other earlier ones, have turned heavily on state statutes—the enabling acts which confer powers on local governments and which Virginia's courts strictly construe in reviewing the exercise of those powers.

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[12] *Williams* finds an additional "discriminatory effect" of a kind held impermissible in *Board of Supervisors* v. *Carper*, 200 Va. 653, 107 S.E.2d 390 (1959). That this brings into play a holding grounded in Virginia statutory law is discussed *infra*, pp. 27 and 30-33.

A. The Supreme Court of Virginia Relied on Standards Grounded in the Virginia Constitution

1. *The Virginia decisions rest on a body of state constitutional law which, independently of the Federal Constitution, serves as the basis for state courts to review exercises of state police power.*

The Virginia decisions in *Allman* and *Williams*, in declaring that "discriminatory" acts are arbitrary and capricious and hence not valid exercises of the police power, rest on a well-developed body of state constitutional law which, long before the existence of the Fourteenth Amendment, served as the basis for state courts to review governmental acts. Sometimes due process is couched in terms of requiring adherence to the "law of the land"—the language which appears in Article I, Section 8 of Virginia's Constitution [13]—and sometimes as "due process of law"—language appearing in Virginia's Article I, Section 11.[14] (Both the United States Supreme Court and the state courts have consistently understood "due process of law" and "law of the land" to be synonymous.)[15]

Due process of law in American jurisprudence embodies several fundamental principles:

(1) Due process of law has long connoted general application of the laws. As Daniel Webster said in his celebrated argument in the *Dartmouth College* case:

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[13] See Appendix, p. 1a *infra*.

[14] See Appendix, p. 2a *infra*.

[15] See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. (59 U.S.) 272, 276 (1856); *State* v. *Rose*, 33 Del. 168, 132 A. 864, 868-69 (1926); *Parish* v. *East Coast Cedar Co.*, 133 N.C. 377, 45 S.E. 768, 770 (1903).

"By the law of the land is most clearly intended the general law.... The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."[16] State courts from early days applied this principle.[17]

(2) Due process of law has long operated as a restraint on the arbitrary or capricious exercise of power. As this Court said in *Dent* v. *West Virginia*, 129 U.S. 114, 124 (1889), "The great purpose of the requirement [of due process] is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."[18]

(3) Due process of law has long been used to protect individuals, and their life, liberty, and property, against discriminatory acts of government. The leading commentator on Virginia's Constitution has observed, "Well before the term 'equal protecton' became a familiar landmark in American jurisprudence, protection against governmental discrimination and insurance of general application of the laws were accepted connotations of Anglo-American due process of law." A. E. Dick Howard, *Commentaries on the Constitution of Virginia* (1974), I, 229-30 [hereinafter *Howard's Commentaries*]. In its report to the General Assembly, Virginia's Commission on Constitutional Revision (three of whose members sit today on the Supreme Court of Virginia) noted that "due process of law has often

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[16] *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. (17 U.S.) 518, 581 (1819).

[17] See, *e.g.*, *Vanzant* v. *Waddel*, 10 Tenn. 259, 270 (1829).

[18] See also 16 Am. Jur.2d, "Constitutional Law" § 550 at 946-47: due process of law and the equivalent phrase law of the land require that classification must not be arbitrary and capricious.

been understood to prohibit invidious discrimination." [19]

(4) Due process of law overlaps with equal protection of the laws. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954)—companion case to *Brown* v. *Board of Education*—struck down public school segregation in the District of Columbia. The Court in *Brown* relied on equal protection, but in *Bolling* it rested on the due process clause of the Fifth Amendment. Chief Justice Warren noted that "as this Court has recognized, discrimination may be so unjustified as to be violative of due process." 347 U.S. at 499.

All of these traditional bases of due process of law—general application of the laws, restraint on arbitrary or capricious acts, protection against discrimination, and ensuring equal treatment—are reflected in the Virginia Court's decisions in *Allman* and *Williams*. Clearly there is no valid reason to suppose that those opinions were grounded in the federal equal protection clause. Petitioner's effort to prove otherwise rests on the sheerest speculation.

Moreover, the Virginia opinions in *Allman* and *Williams* bear no resemblance to federal standards of due process. They belong instead to the tradition, a well established one, that state courts reviewing exercises of state police power use standards having a basis independent of the Federal Constitution. The source of these standards includes but is not limited to due process of law. This Court has recognized this independent body of state law, observing, for example, in *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 556-57 (1940), that

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[19] *The Constitution of Virginia: Report of the Commission on Constitutional Revision* (1969), p. 96 [hereinafter *CCR Report*].

the New York Court of Appeals "has ruled that its own conception of due process governs, though the same phrase in the federal constitution may have been given different scope by decisions of this Court."

With the withdrawal of the United States Supreme Court from reviewing state economic measures, "state constitutional law in some aspects [has become] the primary reliance and battleground for interests pressing for vindication." [20] The result has been the persistence of substantive due process and related concepts among the states—a willingness of courts, using doctrines drawn from state constitutional law, to take a closer look at applications of the police power than a federal court would be entitled to do under the Federal Constitution.

> Therefore, it is not surprising that just as the doctrine of substantive due process was finding expression in the states *before* 1890, so also the principle should continue to enjoy a vigorous life in some states *after* it has fallen into disuse on the national level. . . . In more recent years, state supreme courts have relied solely upon their own state constitutions.[21]

What we call "substantive due process" does not always spring from a due process clause as such (al-

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[20] Paul A. Freund, "Foreword," in *Howard's Commentaries*, p. viii.

[21] Monrad G. Paulsen, "The Persistence of Substantive Due Process in the States," 34 *Minn. L. Rev.* 91, 93, 98 (1950). See also John A. C. Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 *Nw. U. L. Rev.* 13, 226 (1958). Substantive due process is generally traced back to *Wynhamer* v. *People*, 13 N.Y. 378 (1856). See generally Edward S. Corwin, "The Doctrine of Due Process of Law Before the Civil War," 24 *Harv. L. Rev.* 366 (1911).

though frequently, of course, it does). Limitations on legislative power arise from clauses guaranteeing natural rights,[22] guarantees of "due course of law," [23] or from due process or "law of the land" provisions,[24] among others. A state constitution may contain more than one such clause; an example is the Virginia Constitution.[25] Whatever the language, such provisions have the common attribute of placing unspecified general limits on exercises of the power—limits that are expressed in terms of "discrimination," or "arbitrary and capricious," or like language.

Emphasizing the independent basis of state court review of the exercise of state police power are state decisions operating more restrictively upon state power than United States Supreme Court decisions upholding the identical or similar state measure. A striking example arose after the Supreme Court had upheld, against Fourteenth Amendment challenge, a Nebraska statute limiting fees charged by employment agencies.[26] Subsequently the Supreme Court of Nebraska struck down the same statute, relying on the Nebraska Constitution.[27]

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[22] *E.g.*, Va. Const., Art. I, § 1.

[23] *E.g.*, Ind. Const., Art. I, § 12.

[24] *E.g.*, Minn. Const., Art. I, § 2.

[25] See Va. Const., Art. I, § 1 (natural rights), Art. I, § 11 (due process).

[26] *Olsen* v. *Nebraska*, 313 U.S. 236 (1941), *rev'g State* v. *Kinney*, 138 Neb. 574, 293 N.W. 393 (1940).

[27] *Boomer* v. *Olsen*, 143 Neb. 579, 10 N.W.2d 507 (1943), relying on Neb. Const., Art. I, §§ 1, 16, 21, 25. Other examples may be found in comparing United States Supreme Court decisions upholding Green River ordinances and pay-while-voting statutes with state court decisions invalidating respectively those kinds of ordinances and statutes. See Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 *Nw. U. L. Rev.*, 226, 239, 242-43 (1958).

The United States Supreme Court, especially since decisions like *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), and *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), has taken a largely "hands off" attitude to state exercise of the police power in the economic sphere. The Court will, of course, have reason to intervene if that police power is used to infringe federally protected rights (*e.g.*, that private property not be taken without compensation). But where and how to circumscribe the police power is otherwise a matter for the states and their courts.[28]

2. *The Virginia decisions rest upon a body of doctrine, developed under the Virginia Constitution, by which exercises of the police power generally and of the zoning power specifically are measured by standards of "discrimination," "arbitrary and capricious," and "unreasonable."*

Even more than many states, Virginia is notable for the vitality of its tendency to look to its own constitutional doctrines and the rights of the individual. In its 1969 report to the General Assembly, the Commission on Constitutional Revision—whose chairman wrote the *Allman* opinion now before this Court—admonished that, although most of the Virginia Bill of

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[28] State courts consciously have in mind the vindication of values which a federal court faithful to the teachings of *Ferguson* has no place applying. State courts, using due process or other standards, have limited state police power in the name, for example, of the right to the "fruits of one's own industry," *State ex rel. Whetsel* v. *Wood*, 207 Okla. 193, 196, 248 P.2d 612 (1952) (invalidating statute regulating watchmakers), and a belief in "full and free competition," *Union Carbide & Carbon Corp.* v. *White River Distributors*, 224 Ark. 558, 275 S.W.2d 455, 458 (1955) (striking down "fair trade" law).

Rights provisions have a parallel in the Federal Bill of Rights, there is "no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians." [29]

Limitations on the police power. Especially relevant to the present case is the persistence in Virginia of judicial willingness to give closer scrutiny to the exercise of the state police power, as a matter of state constitutional doctrine, than would be appropriate for a federal court applying federal constitutional standards. Virginia's Bill of Rights (Article I, Section 1) begins with language, virtually unchanged since put there by George Mason at the Virginia Convention of 1776, stressing fundamental or natural rights, including "the means of acquiring and possessing property":

> That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Virginia's Article I, Section 1 is grounded in natural law thinking, especially that of John Locke. Notions of natural law in American jurisprudence

> came to be especially potent in such aspects of judicial review as the protection of vested rights (especially property rights and the right to contract), protection of the individual from arbitrary governmental interference with personal liberty, and applications of a test of reasonableness.[30]

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[29] *CCR Report*, p. 86.

[30] *Howard's Commentaries*, I, 66.

In Virginia the collision of property rights implicit in Section 1 and the state's police power "has led to extensive litigation."[31]

Buttressing Article I, Section 1 are other provisions of the Virginia Constitution, notably Article I, Section 8's guarantee against being "deprived of life or liberty, except by the law of the land" and the Article I, Section 11 assurance that "no person shall be deprived of his life, liberty, or property without due process of law." In fixing limits on state police power, the Supreme Court of Virginia has used sometimes one, sometimes another, of these provisions (or sometimes been inexplicit), but a common thread runs through all these cases: that exercise of the police power is to be measured by a standard of reasonableness, that there must not be discrimination, that actions must not be arbitrary or capricious, and that there must be a reasonable relation to the public health, safety, morals, or general welfare.[32]

A leading Virginia case on the limits of the police power, *Young* v. *Commonwealth,* invalidated the conviction of a merchant who had given trading stamps in violation of state law. After a lengthy analysis of the meaning of "liberty" in the context of one's right to pursue a living, the Court ruled that the legislature had acted "arbitrarily" in enacting a statute not "reasonably necessary" to the legislature's purpose. The Court rested its decision on Article I, Section 8 of the Virginia Constitution; it expressly declined to address an equal protection claim.[33]

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[31] *Id.*, I, 63.
[32] See *id.*, I, 195.
[33] 101 Va. 853, 45 S.E. 327, 331 (1903).

Since *Young*, standards of "arbitrary and capricious" or "arbitrary and unreasonable"—standards used in *Allman* and *Williams*—have been regularly applied by the Virginia Court in delineating the scope of the police power. In another leading case, *Moore* v. *Sutton*, decided in 1946, the Court used this approach in striking down a statute regulating the practice of photography. The justices could not see public health, safety, morals, or other interest sufficiently affected by the practice of photography as to justify the legislation.[34]

Other cases applying a Virginia standard of "arbitrary or unreasonable" or "arbitrary and capricious" include a decision upholding against Article I, Sections 1 and 11 challenge a statute proscribing dental advertising, upon a finding that the statute was "not so arbitrary and unreasonable as to fall before the Virginia Constitution";[35] a decision in which, passing upon the validity of a similar piece of legislation dealing with optometric advertising and challenged as contravening Article I, Sections 1 and 11 of the Virginia Constitution, the court concluded the act was not "so arbitrary or unreasonable as to contravene the proper exercise of the police power . . .";[36] and a decision reviewing a Roanoke ordinance permitting the Superintendent of Police to establish and administer the criteria to be met before a resident could obtain a license to drive, the court referring to those basic rights set forth in Article I, Section 1 of the Virginia Constitu-

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[34] *Moore* v. *Sutton*, 185 Va. 481, 39 S.E.2d 348 (1946).
[35] *Goe* v. *Gifford*, 168 Va. 497, 191 S.E. 783, 785 (1937).
[36] *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S.E.2d 210, 224 (1945).

tion as "inherent rights" of which the individual "cannot be arbitrarily deprived by the state."[37]

In applying "arbitrariness" and "reasonableness" standards, the Virginia Court has explicitly recognized that by this state law route it may invalidate exercises of the police power which might be upheld were the only question one of Fourteenth Amendment standards applied by the United States Supreme Court. In *Moore* v. *Sutton*, *supra*, striking down a statute regulating the practice of photography, the court recognized that a contrary result would be reached were the standard a federal one (citing *Nebbia* v. *New York*, 291 U.S. 502 (1934)), but it rested the result on Article I, Section 1 of the Virginia Constitution—a mandate "so vital to the welfare of a free and untrammeled people."[38]

Moore is but one example of how the Virginia Supreme Court, in fashioning standards of unreasonableness, arbitrariness, and capriciousness to limit the police power, has proceeded independently of federal constitutional standards. Sometimes the application of Virginia guidelines has produced results paralleling those reached under federal standards. For example, in *Reynolds* v. *Milk Commission*, the Virginia court in 1935, applying the standard that due process requires a law to be "neither arbitrary nor discriminatory," upheld the regulation of milk prices.[39] *Reynolds* came on the heels of the United States Supreme Court's decision validating similar regulation of the milk industry in *Nebbia* v. *New York*, 291 U.S. 502 (1934). Likewise in

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[37] *Taylor* v. *Smith*, 140 Va. 217, 124 S.E. 259, 262 (1924).
[38] 39 S.E.2d at 351, 352.
[39] 163 Va. 957, 179 S.E. 507 (1935).

1949 the Virginia court arrived at the same result reached by the United States Supreme Court in upholding a state right-to-work law, but the Virginia court rested its conclusions upon a separate analysis of the Virginia constitutional provisions.[40]

On other occasions application of Virginia standards has led to quite different results from those that a federal constitutional measure would yield. Thus, four years after *Reynolds, supra*, the Virginia court in *White* v. *Culpeper* broke from what was becoming the trend of the federal courts to abstain from interfering with state and municipal economic regulations when it invalidated Culpeper's "Green River" ordinance (proscribing uninvited door-to-door solicitation).[41] In *White* the Court found it unnecessary to cite any specific provision of the State or Federal Constitution; it simply held the police power to have been exceeded:

> It does not appear in the case at bar that the interests of the general public are affected in the slightest degree. Unless the general public is affected, there is no warrant in law for the exercise of the police power.[42]

And *White*, like the two decisions at bar, was a decision finding "discrimination" without specifically citing the Federal or State Constitution.[43]

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[40] Compare *Finney* v. *Hawkins*, 189 Va. 878, 54 S.E.2d 872 (1949), with *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

[41] 172 Va. 630, 1 S.E.2d 269 (1939). In *Breard* v. *Alexandria*, 341 U.S. 622 (1951), the Court unanimously upheld a Green River ordinance against a due process attack (the Court split in upholding it on First Amendment and commerce grounds).

[42] 1 S.E.2d at 272.

[43] 1 S.E.2d at 273.

The standards used by the Virginia court in *Allman* and *Williams*—finding the Board's actions to have been discriminatory and hence arbitrary and capricious—thus have their source in a long line of Virginia cases measuring exercises of the police power against the requirements of Virginia's Constitution, especially Article I, Sections 1, 8, and 11.

Zoning cases. In zoning cases specifically, as in police power cases generally, the Supreme Court of Virginia has repeatedly used Virginia standards of "arbitrary," "capricious," "unreasonable," and like language quite independently of federal constitutional measures. In *Board of Supervisors* v. *Carper*, 200 Va. 653, 107 S.E. 2d 390 (1959), the court found that the effect of Fairfax County's Freehill Ordinance was to prevent people of modest means from living in the western two-thirds of the County. Declaring that the County may not "arbitrarily or capriciously" deprive one of the legitimate use of his property, the court found the amendment to be "unreasonable and arbitrary, [bearing] no relation to the health, safety, morals or general welfare."[*] The court cited no specific state or federal constitutional provisions. In another case, *Boggs* v. *Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508, 510-11 (1971), the court held that precluding a landowner of all beneficial use of his property was "unreasonable and confiscatory, and therefore unconstitutional." Here again no state or federal constitutional provisions were cited.

Further proof of the court's nonfederal approach to police power exercise in the land use field is found in *Board of Supervisors of Fairfax County* v. *Horne*, 216 Va. 113, 215 S.E.2d 453 (1975), a decision written by

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[*] 107 S.E.2d at 396-97.

Justice Cochran, the dissenting justice in *Williams*, and handed down simultaneously with *Williams*.[45] The court in *Horne* used an analysis of Virginia constitutional and legislative history to invalidate the Board's Interim Development Ordinance on the ground that there was no express or implied authority for its enactment. Although unnecessary to the ultimate grounds of decision, the court also used traditional natural rights/due process analysis and discussed at length the "delicate balance" between individual property rights and the health, safety, and welfare of the public. 215 S.E.2d at 458.

In *Allman*, the Board argued, as it does here, that the Allman application was denied because of an inadequacy of public facilities. Both the trial court and the Supreme Court of Virginia found sufficient public facilities were either available or would be available in the foreseeable future, and that other properties zoned to higher density contemporaneously with the denial of the Allman application would have the "same, or even greater, impact than would have resulted from the Allman development." In further support of its holding, the court below quoted the admission of a Board employee, Pammel, that the "Clinch development involved the same problems for the County as would Allman's development" and that the Allman proposal was actually "more favorable to the County in terms of cost benefit analysis than a standard conventional subdivision such as Clinch," whose rezoning was granted at the very time the Allman application was denied. 211 S.E.2d at 153. Such a course of action, the

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[45] In his *Williams* dissent, which the Board in its Petition has attempted to elevate to the posture of a majority opinion, Justice Cochran was careful to reaffirm and distinguish his dissent from the unanimous *Allman* opinion. 216 S.E.2d at 46-47 (dissent).

Court concluded, was "inconsistent and discriminatory." 211 S.E.2d at 53, 55.

Considering the language of Virginia cases like *Carper, supra,* and the *Allman* court's persistent advertence to the traditional Virginia constitutional terminology (arbitrary, capricious, unreasonable, inconsistency), *Allman* is firmly based upon Virginia constitutional considerations.

In *Williams,* the Virginia Supreme Court repeatedly referred to the "discriminatory effect" of the Board's "arbitrary and capricious" denial of the Williams application, and the Board's inconsistent action in using the Pohick Plan as a "sword" to permit development of some property in the Middle Run area while at the same time using it as a "shield" to justify denial of similar treatment to other properties in the same area. The Court concluded: "This is the same type discriminatory practice described as arbitrary and capricious and therefore condemned in [*Allman*]." 216 S.E.2d at 41.

In both *Allman* and *Williams* the court gave "full credit" to the presumption of validity which accompanied the Board's denials of the rezoning requests, analyzed the "reasonableness" of the Board's actions, and stated that the presumption would stand if the propriety of the zoning classification left on each property were "fairly debatable." Aside from its use of Virginia constitutional terminology and analysis, the *Williams* court's reliance upon Virginia constitutional considerations is clear (216 S.E.2d at 40) (emphasis added):

> In determining whether, in a given case, the presumption of reasonableness of zoning actions prevails or is overcome, *we have established these maxims* . . . .

When the Supreme Court of Virginia intends to rest a decision on Fourteenth Amendment due process or equal protection grounds, it has only to say so. There are ample decisions in which it has done just that.[46] In light of those decisions, it strains a point to try, as Petitioner does here, to extract a federal constitutional ground from a decision whose language is so completely in line with the general run of Virginia decisions testing exercises of the police power against Virginia standards of "discrimination," "arbitrary and capricious," and "unreasonable."

B. The Standards Relied on by the Supreme Court of Virginia Were Grounded Also in Virginia Statutes.

The *Allman* and *Williams* decisions are grounded in Virginia statutes in two ways. In the first place, the court's conclusion that the Board's actions in the respective cases were discriminatory, hence arbitrary and capricious, and thus bore "no reasonable or substantial relation to the public health, safety, morals, or general welfare"[47] directly parallels the Virginia statutes under which counties exercise the police power generally and the zoning power specifically. Secondly, the decisions rest squarely on an earlier Virginia decision, *Board of Supervisors* v. *Carper,* 200 Va. 653, 107 S.E.2d 390 (1959), which in turn had found discrimination in violation of a Virginia statute requiring uniformity in zoning regulations.

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[46] See, *e.g.*, *Archer* v. *Mayes*, 213 Va. 633, 194 S.E.2d 707 (1973); *Standard Drug Co.* v. *General Electric Co.*, 202 Va. 367, 117 S.E.2d 289 (1960); *Weber City Sanitation Comm'n.* v. *Craft*, 196 Va. 1140, 87 S.E.2d 153 (1955); *Williams* v. *City of Richmond*, 177 Va. 477, 14 S.E.2d 287 (1941).

[47] 211 S.E.2d at 55; 216 S.E.2d at 41 (the latter incorporating by reference the language of *Allman*).

Localities' powers strictly construed. In Virginia, local governments have only such powers as are affirmatively conferred upon them by the General Assembly. Under Article VIII, Section 2 of the Constitution of Virginia, the General Assembly is authorized to provide by general law or special act, for the powers to be granted local governments. In Virginia, as in many states, the courts tend to construe grants of power to localities narrowly.

Dillon's Rule, a canon of construction first advanced in the nineteenth century, was accepted in Virginia soon after its pronouncement, and it is still adhered to by her courts.[48] The rule, as reaffirmed in a 1975 Virginia case, holds that localities "have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable."[49]

In 1969 the Commission on Constitutional Revision recommended that Dillon's Rule be reversed in Virginia by constitutionally conferring on cities and certain counties all powers not denied them by the Constitution, their charters, or laws enacted by the legislature.[50] The General Assembly, however, rejected the proposal, as the Virginia Supreme Court has noted.[51]

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[48] *Kirkham* v. *Russell*, 76 Va. 956 (1882); *City of Richmond* v. *Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958). For Dillon's statement of the rule, see John F. Dillon, *Law of Municipal Corporations* (2d ed., 1873), I, 173; *Clark* v. *City of Des Moines*, 19 Iowa 199, 212, 87 Am. Dec. 423 (1865).

[49] *Board of Supervisors* v. *Horne*, 216 Va. 113, 215 S.E.2d 453, 455 (1975).

[50] *CCR Report*, pp. 228-30.

[51] 215 S.E.2d at 456.

Hence the rule laid down by that court is that a county's powers "are fixed by statute and are limited to those conferred expressly or by necessary implication."[52] A corollary of the rule is that "any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the [municipality] and the power is denied."[53]

Zoning actions must promote "health, safety, or general welfare." The general police power has been delegated to the counties in Va. Code Ann. § 15.1-510:

> Any county may adopt such measures as it may determine expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this State . . . .

The zoning power has been delegated to localities by Va. Code Ann. § 15.1-486:

> The governing body of any county or municipality may, by ordinance, divide the territory under its jurisdiction . . . into districts . . . and in each district it may regulate, restrict, permit, prohibit, and determine the . . . use of land . . . .

The purpose of zoning has been defined by § 15.1-489 to be:

> . . . for the general purpose of promoting the health, safety or general welfare of the public. . . .

In *Allman* the court held that the Board's action, having been shown to be discriminatory, bore "no reasonable or substantial relation to the public health,

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[52] 215 S.E.2d at 455.

[53] *City of Richmond* v. *Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958).

safety, morals, or general welfare." In *Williams* the court found the "discriminatory practice" in that case to fall within the condemnation in *Allman*. The language of those opinions is grounded both in the Virginia statute (Va. Code Ann. § 15.1-510) giving counties the general police power to promote the "health, safety, and general welfare" and in the statute (Va. Code Ann. § 15.1-489) defining the purpose of zoning ordinances as being to promote the "health, safety, or general welfare" of the public. The Board's actions in both *Allman* and *Williams* were found not to bear a reasonable relation to the public health, safety, morals, or welfare; hence they could not have been a valid exercise of the police and zoning powers conferred by statute.

Statutory requirement of uniformity. Another relevant statute is Va. Code Ann. § 15.1-488, which lays down the requirement of uniformity in zoning actions: "All such [zoning] regulations shall be uniform for each class or kind of buildings and uses throughout each district . . . ."

A look at the arguments made to the Supreme Court of Virginia in both *Allman* and *Williams* and a comparison of those arguments with the decisions themselves makes clear the grounding of those decisions in Virginia statute law. In their brief before the Virginia court in *Allman,* counsel for Allman argued that the denial of the rezoning was "discriminatory and without legal justification." The brief cited both the Fourteenth Amendment and the Virginia Constitution.[54] Yet the *entire* argument developing the discrimination point sought to bring *Allman* within another Virginia decision, *Board of Supervisors* v. *Carper,* 200 Va. 653,

[54] Allman brief, p. 44.

107 S.E.2d 390 (1959), in which the Court had held that an amendment to the Fairfax County zoning ordinance permitting "a person to build on a lot of less than two acres, while denying his neighbor the right to build unless he puts his house on a lot containing a minimum of two acres" lacked uniformity and therefore violated the predecessor of Va. Code Ann. § 15.1-488. Allman's brief concluded its discrimination argument by saying (Brief, p. 48):

> To paraphrase *Carper,* if the facilities and services were in such dire [straits], and if the public health, safety and welfare were to be detrimentally impacted by the Allman application, then why did the Board permit the zoning and development of surrounding properties in comparable or greater densities during the same period of time?

Likewise when the brief for Williams before the Virginia Supreme Court argued that the Board's denial was "discriminatory and without legal justification," that brief, too, made perfunctory citation of the Fourteenth Amendment and the Virginia Constitution.[55] But the *entire* discrimination argument developed the thesis that the *Carper* Court's interpretation of the Virginia uniformity statute supported the trial court's finding of discrimination in this case. Thus Williams's brief concluded its discrimination argument by saying (Brief, p. 42):

> Denial of Williams in the face of continued development activity in the Middle Run in the immediate vicinity of Williams, is clearly discriminatory. To paraphrase *Carper,* if facilities and services were in such dire [straits], and if the Williams's applications were to detrimentally impact the public health, safety and welfare, then why

[55] Williams brief, p. 40.

> did the Board grandfather the zoning and development of surrounding properties in comparable or greater densities during the same period of time?

In sum, the discrimination argument in both the *Allman* and *Williams* briefs was based squarely on the Virginia uniformity statute as interpreted in *Carper*. That statute therefore underpins the conclusion of the court in *Allman*, 211 S.E.2d at 55, that Allman's evidence "established a course of action by the Board that was inconsistent and discriminatory" and the court's conclusion in *Williams*, 216 S.E.2d at 41, that the effect of the Board's action "was to discriminate between similarly situated property . . . [T]he land in question extensively borders or is nearby other property already zoned for higher density use. No demonstrated real difference distinguishes the various properties and justifies granting preferred status to one property while denying it to another."

Perhaps the most telling evidence that the Virginia decisions are grounded in the Virginia statutes rather than in Fourteenth Amendment equal protection comes from the County's Petition for Rehearing in the Virginia Supreme Court in *Allman*. In that Petition the County states quite candidly that "the federal concept of equal protection . . . is also codified in Virginia zoning law (*Va. Code Ann.*, § 15.1-488), which requires that all property in the same category (*e.g.*, RE-1) be subject to the same restrictions."[56] It must be more than a little embarrassing for Petitioner, having conceded that the Virginia statute—to which the Court's holding on both *Allman* and *Williams* owes such an obvious debt—embodies the concept of federal equal

[56] Petition for Rehearing, p. 6.

protection, now to argue that the Virginia court's conclusion of "discrimination" must refer to the Fourteenth Amendment rather than to the Virginia statute.

II. The Decisions of the Supreme Court of Virginia Rest on Adequate and Independent State Grounds

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945). The burden is on Petitioner seeking a writ of certiorari from this Court to make an affirmative showing from the record

> not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. *New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). The basis for this rule lies in the limits of the Court's jurisdiction—that the Court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *Herb* v. *Pitcairn*, 324 U.S. at 125-26.

Petitioner submits in this case that the grounds of the Virginia decisions in *Allman* and *Williams* are unclear. Petitioner proceeds to argue that when it is unclear whether the state decision rests on state or federal grounds the Court should grant certiorari.

Petitioner errs in both regards. Even assuming ambiguity as to the grounds of decision below—which there is not—and it were tenable to argue that the Vir-

ginia decisions might have rested on either Virginia or federal grounds, this Court has stated, *Lynch* v. *New York ex rel. Pierson*, 293 U.S. at 54-55:

> Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.

If the state court opinion be considered ambiguous, "we should choose the interpretation which does not face us with a constitutional question." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 299-300 (1956).

Equally fundamental is Petitioner's error in suggesting that there is reason to suppose the Virginia decisions involved any federal ground at all. One has to struggle to read even a hint of a federal ground into either decision. Nowhere in either the *Allman* or the *Williams* decision is there any reference to the Federal Constitution or to any federal statute. Nowhere is there a reference to or reliance upon the findings of a federal case.[37] Nowhere in the *Allman* or *Williams* holdings is there a reliance upon either the principles derived from or language found in the Federal Constitution, federal statutes, or federal case law. Nowhere can there be singled out any intimation or impression that the Virginia Supreme Court felt compelled by the Federal Constitution to invalidate the Board's legislative acts. Neither case came to the Supreme Court of Virginia with any indication of a determination by the

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[37] *Allman*, 211 S.E.2d at 54, quotes a passage from *County of Fairfax* v. *Parker*, 186 Va. 675, 44 S.E.2d 9, 11-12 (1947), which in turn cites *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926).

trial courts of federal constitutional or statutory questions. Both cases entail substantial findings of fact by both the trial court and the Virginia Supreme Court. In both cases the actual underpinnings offered by the Board in support of the validity of its acts was, in the opinion of both the trial court and the Supreme Court, not even fairly debatable. The principal Virginia case relied upon by the court below, *Caper*, *supra*, clearly rested upon a series of factual determinations concerning violation of a state statute requiring uniformity in zoning ordinances.

The Board's reliance upon *Minnesota* v. *National Tea Company*, 309 U.S. 551 (1940), is unfounded. In *National Tea*, the Supreme Court of Minnesota explicitly discussed in its opinion both the equal protection clause of the Fourteenth Amendment of the Federal Constitution as well as Article IX, Section 1 of the Minnesota Constitution. It quoted the conclusion of the lower Minnesota court that the subject statute violated both federal and state constitutional principles; the Court appeared to place substantial reliance upon five different federal court decisions. 309 U.S. at 552, 555. This Court held that "the opinion as a whole leaves the impression that the [Minnesota] court probably felt constrained to rule as it did because of five [cited] decisions . . ." which rested on Federal Fourteenth Amendment considerations. *Ibid.* This Court was concerned about the "strong indication" that the Federal Constitution controlled the Minnesota decision. 309 U.S. at 556.

That state and federal constitutions have similar provisions is, of course, no reason to assume that a state court decision was grounded on the Federal Constitution. *Jankovich* v. *Indiana Toll Road Comm'n*, 379

U.S. 487, 491 (1965). Especially is this true where, as here, the state decision makes no mention whatever of *either* constitution.

The true ground of decision in the state court opinion may be sought in the "organization and language of the opinion." *Jankovich* v. *Indiana Toll Road Comm'n*, 397 U.S. at 491. In this brief in opposition, we have shown how the *Allman* and *Williams* decisions are grounded in a well developed body of Virginia constitutional principles, in the established state law standards (resting upon Dillon's Rule) for reviewing localities' exercise of delegated police and zoning powers, and in Virginia statutes requiring uniformity in zoning decisions. Even were one to strain the *Allman* and *Williams* opinions and somehow, against all the evidence, infer some federal dimension, the obvious grounding in Virginia constitutional and statutory law would still constitute an adequate and independent state ground of decision requiring dismissal.

III. Even Assuming Federal Grounds of Decision Are Involved in *Allman* and *Williams*, the Decisions Involve Matters of Traditional State Concern. Further, Because They Turn on Local Facts and Circumstances, the Decisions Present No Question of Sufficiently General Importance Worthy of Certiorari.

A. Zoning and Land Use Are Matters of Traditional State and Local Concern Properly Left to State Legislatures and Courts

Zoning and land use are matters peculiarly within the state interest and concern. Indeed the authority to regulate and control the individual property owner's use of land resides in the local jurisdiction under the police power pursuant to a delegation of this authority

by the state legislature.[38] If the present system of delegating and defining the scope of the zoning power does not effectively serve the interest of a particular state in furthering the general welfare of the locality, region, or entire state,

> It is the state legislature's and not the federal courts' role to intervene and adjust the system . . . [T]he federal court is not a super zoning board . . . *Construction Industry Association of Sonoma County* v. *Petaluma*, Slip Opinion at 17, Record No. 74-2100 (9th Cir., August 13, 1975).

The proper forum for resolving land use questions and policies is at the state and or local level. A dramatic intrusion of the kind sought by Petitioner into an area of traditional state concern is not warranted. Cf. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 40 (1973).

The Board also argues that the Virginia court's decision invalidating the Board's actions in these two cases denies other citizens of Fairfax County due process of law by impairing the Board's legislative functions. Aside from ignoring the court's finding that the Board's land use policies in fact discriminate against and exclude "other citizens," such an argument asks this Court to review a state court's decisions about the reach and amenability to judicial scrutiny of state police power, a matter peculiarly governed by state law. Decisions as to what functions should be performed by state courts and what by legislative bodies, in short questions of separation of powers in state and local governments, are for the states to decide. Cf. *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (1957).

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[38] See Va. Code Ann. §§ 15.1-486, -489 in Appendix, *infra*, at pp. 2a, 3a.

B. Zoning Decisions Turn on Local Facts and Circumstances and Hence Involve Issues of Limited Application.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rule 19. Obviously if a case involves legal principles which of their nature vary from one state or locality to another, or if the case turns on its particular facts and circumstances, Supreme Court review is not appropriate. This is such a case.

For the Board to argue that the net effect of two Virginia land use decisions "could be to return the United States to the uncontrolled situation that existed prior to . . . *Euclid* . . ." [59] is preposterous. A quick review of state zoning decisions, with particular focus on California, Florida, Illinois, Maryland, Nevada, New Jersey, New York, Oregon, Pennsylvania, Utah, and Virginia, reflects a wide and often conflicting divergence of opinion, interpretation, and restriction or approval of police power zoning activity. Oregon, for example, considers zoning activity by the local governing body to be quasi-judicial in nature whereas Virginia and the majority of states consider zoning to be a legislative act. Compare *Fasano* v. *Board of County Commissioners*, 507 P.2d 23 (Ore. 1973), with *Boggs* v. *Board of Supervisors, supra*, 178 S.E.2d at 511 (1971).

The states have, apparently, demonstrated no particular inclination to be overly influenced in their land use decisions by the decisions of other courts or the statutory construction of other local and state juristions. Despite the many areas of disagreement, the

[59] Petition for Writ of Certiorari at 58.

Board has conceded that zoning and land use are presently in a regulated or controlled situation.[60]

Zoning issues, especially the reasonableness of ad hoc decisions on particular rezoning applications, typically are determined on the basis of the facts and circumstances in each case. *Euclid* v. *Ambler Realty Co., supra,* 272 U.S. at 387-88. The precedential value of any particular case is therefore inherently limited even within its own jurisdiction, and its ability to exert influence across state lines is even more tentative.

C. *Allman* AND *Williams* TURN ON THEIR FACTS AND ON THE PARTICULAR CIRCUMSTANCES IN FAIRFAX COUNTY.

The facts and circumstances in both *Allman* and *Williams* greatly limit their precedential value. In each case the application of long-established zoning principles to a particular factual pattern resulted in a finding of arbitrary and capricious legislative activity discriminating against and resulting in a denial of due process to the subject property owners. There are certainly no new principles of law enunciated in either case.[61]

Allman involves the denial by a local governing body of a zoning application seeking approval of a land use comprehensively planned for fifteen years. The Vir-

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[60] Ibid.

[61] In oral argument on its Petition for Writ of Error and again on Appeal, the Board exhorted the court below to take a "fresh look" at and redefine the zoning "rules" in Virginia as there had been no "major review" since *Carper*, handed down 15 years previously. Upon reaffirmation of the *Carper* principles in *Allman* and *Williams*, the Board now argues that these cases will cause a loss of control over zoning laws throughout the country. The Board's inconsistency reflects appalling opportunism.

ginia court found that Allman's PDH-3 proposal would have provided the Court substantially greater benefit with more control over ultimate development than would the traditional zoning categories."[62]

The Allman application was submitted for PHD zoning in an effort to comply with Board policy which encouraged PDH uses in the Upper Potomac Planning District suburban density clusters. Allman was located within one of those planned clusters, the Herndon cluster.[63]

Prior and subsequent to the Allman denial the Board granted higher density rezonings on several other properties in the immediate vicinity of the Allman tract. All were located in the same Upper Potomac Planning District of Fairfax County, and all but the Reston applications were part of the planned Herndon cluster. All but the Reston applications were granted for traditional zoning categories rather than the preferred, more beneficial PDH category. All were served by the same public facilities, and both state courts found that the other applications would have the same or greater impact than Allman on the facilities. *Allman*, 211 S.E.2d at 54. Allman had greater access to better roads than, for example, did the Clinch or Reston applications.

Despite its strained arguments to the contrary, the Board has conceded that Allman was situated similarly to those properties granted rezonings.[64] And the testimony of a series of department level Board employees,

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[62] 211 S.E.2d at 53; *Allman* App., Vol. II at 140-41.

[63] *Allman* App., Vol. II at 123, 141; Vol. III at 44.

[64] "Much has been made of the *fact* that the *Williams* and *Allman* properties were similarly situated to those of other landowners whose property fell . . . on the more fortunate side of the [rezoning] line." Petition for Writ of Certiorari at 25-6.

including the recalcitrant Mr. Pammel,[65] established unequivocally the availability of public facilities to the Allman tract. The court below found the Board's argument that Allman would have unduly impacted available public facilities was negated by the evidence,[66] and concluded the reason for the Board's denial by a four-to-three vote was "prematurity"[67] despite the fact Allman had for fifteen years been comprehensively planned for the density sought. The court also found that Reston was accorded preferential zoning status as a matter of policy, to the detriment or deprivation of Allman and other land owners in the area.

In *Williams* the Supreme Court of Virginia examined the entire record and found it supported "each and every one of the trial court's findings": (1) public facilities were or soon would be available to serve the land in question, (2) nearby similarly situated property had already been rezoned for higher density use, (3) the zoning existing on the subject property was unreasonable and therefore invalid, and (4) it was discriminatory and therefore arbitrary and capricious to deny the higher density zoning sought by Williams.[68]

Evidence offered by Williams established the superior suitability of the subject property for development in the R-12.5 category, the change in character of the neighbrhood from RE-1, the higher cost of one acre development, the vast diminution in value resulting from retention of the RE-1 category, the tremendous shortage of buildable lots in Fairfax County, and

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[65] *Allman* App., Vol. II at 123, *et. seq.*
[66] 211 S.E.2d at 54.
[67] 211 S.E.2d at 52; *Allman* App., Vol. II at 149.
[68] 216 S.E.2d at 39-40.

the exclusionary effect of the Board's land use policies creating a County for the "fairly rich". Each evidentiary element went uncontradicted by the Board. The Board's denial of Williams was rendered totally untenable and thus unreasonable, however, by the finding below of public facilities availability. "The factual underpinning of the Board's reliance [on the timing mechanism in its Middle Run policy] failed."[69]

By the time the Board adopted its no-development policy for the Middle Run, one-third of the area had already been rezoned to higher density. This number increased to 41% by the time Williams was denied, and an additional 64-acre tract was rezoned shortly after the Williams denial and prior to the Williams trial.

As reflected by the respective opinions, in the process of reviewing both *Allman* and *Williams* the court below clearly accorded the Board its presumption of legislative validity, scrutinized the property owners' evidence of unreasonableness and the Board's offerings in support of its denials, and concluded that the reasonableness of the denial was not fairly debatable. The analytical process was accomplished within the context of well-settled principles of zoning law, and the outcome turned on the particular facts and circumstances in each case.

The court's affirmances and the facts and circumstances upon which they rest are both directly tied into the Fairfax County land use scene, a scenario of events and personalities atypical of Virginia, much less other states or the country as a whole.

Land use regulation in Fairfax County has been a function of Board complexion.[70] The present Board as-

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[69] 216 S.E.2d at 40.

[70] *Allman* App., Vol. II at 141.

sumed office in January 1972, adopted a "no-growth" policy, and immediately took steps to down-zone the Clinch property by alleging "mistake" on the part of the preceding Board despite a favorable recommendation from both its professional planning staff and planning commission. As reflected in the *Williams* record, this Board then proceeded arbitrarily to refuse public hearings to Williams and a number of other rezoning applicants while granting preferential treatment and hearings to others, a practice struck down by the trial court in the *Williams* case. In his Court-ordered hearing, Williams' request for rezoning in accord with land use plan density was denied in a summary fashion after nearly 28 months waiting to be heard. The Williams application has now been pending for nearly five years, Allman for four.

Since this Board took office, its accumulated actions have led to numerous Virginia Supreme Court decisions invalidating as arbitrary and capricious several of its land use actions.[71] These decisions represent ap-

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[71] *Board of Supervisors of Fairfax County* v. *Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972) (vesting of rights —refusal to process site plan);

Board of Supervisors of Fairfax County v. *City Service Oil Co.*, 213 Va. 359, 193 S.E.2d 1 (1972) (companion case to *Medical Structures*);

Board of Supervisors of Fairfax County v. *DeGroff Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973) (ordinance requiring 15% low and moderate income housing held arbitrary, capricious, confiscatory, and without authority);

Board of Supervisors of Fairfax County v. *Lukinson*, 214 Va. 239, 198 S.E.2d 603 (1973) (companion case to *DeGroff*);

Board of Supervisors of Fairfax County v. *Snell*, 214 Va. 655, 202 S.E.2d 889 (1974) (down-zoning from comprehensively planned density invalidated—arbitrary and capricious);

Board of Supervisors of Fairfax County v. *Horne, supra*, (Interim Development Ordinance invalidated—lack of authority).

proximately 50 to 60% of the Virginia Supreme Court's total number of land use decisions during the Board's tenure, and they reflect repeated rejection, by a state court of last resort, of the persistent attempts by a local jurisdiction to expand its police power beyond the scope of delegated authority. *Allman* and *Williams* are merely a continuation of this state court/local government interplay in which the Board's actions have been invalidated on state constitutional and statutory grounds upon records overwhelmingly demonstrating inconsistent and discriminatory behavior.

D. Application of Fourteenth Amendment Standards to the Particular Facts of the *Allman* and *Williams* Cases Presents No Issue Worthy of Supreme Court Review

Clearly there is not the least suggestion of federal constitutional grounds in the *Allman* and *Williams* decisions. If one assumed, however, that the decisions below did involve either equal protection or due process standards under the Fourteenth Amendment, there would be no occasion for this Court to review the Virginia court's findings of discrimination or to see whether those findings show an equal protection or due process violation.

The relevant equal protection and due process standards are easily stated. Equal protection requires that the classification "must be reasonable, not arbitrary, and must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). Due process, "as has often been held, demands only that the law

shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object to be attained." *Nebbia* v. *New York, supra,* 291 U.S. at 525.

Courts called upon to decide the constitutionality of zoning actions as they impinge upon private property rights inevitably are being asked to balance, on the facts of the particular case, the private and public interests at stake—the purpose of the regulation, its economic impact upon a property owner, the fairness of classification, etc. Rezoning applications in particular require ad hoc decisions, no two of which are just alike.

Both equal protection and due process are ultimately concerned that arbitrary or invidious distinctions are not made among those who, in light of a zoning ordinance's legitimate purposes, ought not to be treated differently. Applying that test to the *Allman* and *Williams* cases, it is obvious there are findings sufficient to support a denial of equal protection or due process. But the important point, for the purposes of certiorari, is that it would be an unfortunate use of this Court's limited time to sift the facts of a particular rezoning case to see whether a state court drew permissible inferences of discrimination or arbitrariness which would support a conclusion that equal protection or due process was denied. Neither of the instant cases raises any question of general application about zoning power. Compare *Euclid* v. *Ambler Realty Co., supra.* Instead they turn on the facts of two sets of rezoning petitions—facts that have been weighed and canvassed and upon which findings have been entered by two courts, trial and appellate. These are not cases worthy of certiorari.

CONCLUSION

In essence this case is an effort to read into a state court opinion a federal ground which is simply not there. It is an attempt to have this Court displace a state court's application of state constitutional and statutory standards to a locality's exercise of powers delegated to it by state law. It is an attempt to have this Court undertake to review factual findings turning on the circumstances of a particular Virginia county. How one state chooses, under its constitution and statutes, to measure the police powers of its own political subdivisions is clearly inappropriate for Supreme Court review.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

APPENDIX

CONSTITUTION OF VIRGINIA

Article I.

BILL OF RIGHTS.

A DECLARATION OF RIGHTS made by the good people of Virginia in the exercise of their sovereign powers, which rights do pertain to them and their posterity, as the basis and foundation of government.

§ 1. Equality and rights of men.—That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

§ 8. Criminal prosecutions.—That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

Laws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class.

In criminal cases, the accused may plead guilty. If the accused plead not guilty, he may, with his consent and the concurrence of the Commonwealth's Attorney and of the court entered of record, be tried by a smaller number of jurors, or waive a jury. In case of such waiver or plea of guilty, the court shall try the case.

The provisions of this section shall be self-executing.

§ 11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.—That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

Virginia Code, Title 15.1*

§ 15.1-486. Zoning ordinances generally; jurisdiction of counties and municipalities respectively.—The governing body of any county or municipality may, by ordinance,

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* Code sections are here reproduced as they appeared at the time of both trial court and Supreme Court of Virginia decisions in *Allman* and *Williams*. Sections 15.1-486 and 15.1-489 have since been amended, effective July 1, 1975, in a manner not pertinent to the subject decisions.

divide the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and area as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agricultural, commercial, industrial, residential, flood plane and other specific uses;

(b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;

(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used;

(d) The excavation or mining of soil or other natural resources; and

(e) Sedimentation and soil erosion from nonagricultural lands.

For the purpose of zoning, the governing body of a county shall have jurisdiction over all the unincorporated territory in the county, and the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality.

§ 15.1-488. Regulations to be uniform.—All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts.

§ 15.1-489. Purpose of zoning ordinances.—Zoning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of

further accomplishing the objectives of § 15.1-427. To these ends, such ordinances shall be designed (1) to provide for adequate light, air, convenience of access, and safety from fire, flood and other dangers; (2) to reduce or prevent congestion in the public streets; (3) to facilitate the creation of a convenient, attractive and harmonious community; (4) to expedite the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements; (5) to protect against destruction of or encroachment upon historic areas; (6) to protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, panic or other dangers; and (7) to encourage economic development activities that provide desirable employment and enlarge the tax base.

§ 15.1-510. General powers of counties.—Any county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this State. Such power shall include, but shall not be limited to, the adoption of quarantine regulations affecting both persons and animals, the adoption of necessary regulations to prevent the spread of contagious diseases among persons or animals and the adoption of regulations for the prevention of the pollution of water in the county whereby it is rendered dangerous to the health or lives of persons residing in the county.

REPLY

BRIEF

FILED
OCT 29 1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-388

THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Petitioner,*

v.

ROY G. ALLMAN, Trustee, ET AL., *Respondent.*

THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Petitioner,*

v.

THOMAS R. WILLIAMS, ET AL., *Respondent.*

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REPLY BRIEF OF PETITIONERS

ARGUMENT

I. The Supreme Court of Virginia Relied on the Fourteenth Amendment to the United States Constitution.

Respondents contend:

> Nowhere is there a reference to or reliance upon the findings of a federal case.[57] Nowhere in the *Allman* or *Williams* holdings is there a reliance upon either the principles derived from or language found in the Federal Constitution, federal statutes, or federal case law. Brief in Opposition, p. 34.

It is interesting to note that Respondents' footnote 57 admits a citation to *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926). The Board has already shown a clear reliance on the case law of this Court.[1]

[1] *See* Petition For Writ of Certiorari, p. 15, note 2.

A. Equal Protection

The Board has also traced and clearly shown a reliance on Equal Protection.[2] This reliance was specifically acknowledged by Justice Cochran, who concurred in *Allman,* in his dissent in *Williams* and by Justice Poff, a member of the majority in both *Allman* and *Williams,* in his opinion in *Board of Supervisors of James City County* v. *Rowe,*[3] another land use case decided the same day as *Williams* and the same day rehearing was denied in *Allman.* Interestingly, Respondents have not seen fit to address *Rowe* in their Brief in Opposition.

As noted[4] the *Virginia Constitution* does have a discrimination clause but does not have a equal protection clause. The discussion of the discrimination clause in *The Constitution of Virginia: Report of the Commission on Constitutional Revision,* cited by Respondents, should be decisive.

> *Anti-discrimination clause.* The antidiscrimination clause which the Commission proposes adding at the end of section 11 would perform functions analogous to those of the federal equal protection clause, except that the language proposed for section 11 is more tightly drafted than the federal provision and therefore is less open-ended in its possibilities of application than is the federal language. *Id.,* at p. 96. *See also,* Howard, *Commentaries on the Constitution of Virginia,* (1974), p. 234.

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[2] *Id.,* pp. 11-15.

[3] 216 S.E.2d 199 (Va. 1975) reprinted in *Appendix* of Petition For Writ of Certiorari.

[4] Petition For Writ of Certiorari, p. 14, note 9.

The pertinent part of section 11[5] reads as follows:

> . . . that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex or national origin shall not be abridged . . . .

Clearly, then, the references to the "constitutional right to equal protection" and "equal protection guarantee" are far beyond the "tightly drafted" Virginia constitutional provision on discrimination and find their basis in the Fourteenth Amendment to the United States Constitution.[6]

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[5] This provision is printed in its entirety in the Petition For Writ of Certiorari at Footnote 9.

[6] Respondents contend at page 32 of the Brief in Opposition that the Board has previously stated that the Equal Protection Clause of the Fourteenth Amendment has been codified in Virginia in *Va. Code Ann.* § 15.1-488. Taken in context the referenced statement is hardly so broad. Section 15.1-488 reads as follows:

> Regulations to be uniform—All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts. (*See Appendix* to Petition For Writ of Certiorari, p. 89)

This statute simply means that one RE-1 (single family residence—one acre) district as applied to one specific piece of property must have the same regulations as an RE-1 district applied to another piece of property. However, R-12.5 (single family residence—12,500 square feet) districts may have different regulations than RE-1 districts.

When read, the simplicity of this statute also makes ridiculous Respondents' apparent contention that the Supreme Court of Virginia based its decisions in *Allman, Williams* and *Rowe* on this statutory provision. Brief in Opposition, pp. 30-31. At no point did Allman or Williams contend that the regulations in their RE-1 district were any different from regulations in other RE-1 districts.

It should also be noted that *Board of Supervisors* v. *Carper*, 107 S.E.2d 390 (Va. 1959), the case which Respondents contend was the basis for the lower court's holding in *Allman* and *Williams* under *Va. Code Ann.* § 15.1-488, was written by Justice I'Anson who joined the dissent in *Williams*.

Respondents cite cases which specifically rely on the *Virginia Constitution.*[7] They admit, however, that neither *Allman* nor *Williams* does so.[8] Not a single provision of the *Virginia Constitution* was cited, or discussed in either *Williams* or *Allman.* Respondents cite no case where the Supreme Court of Virginia uses "equal protection" when referring to the State Constitution or statutes. Cases are cited in which the Supreme Court of Virginia has specifically cited the Fourteenth Amendment.[9] In three of the four cases cited, the Virginia court upheld the challenged acts against a Fourteenth Amendment challenge. In the fourth case, *Williams* v. *City of Richmond,*[10] the actions were declared unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The latter is referred to as "a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution" and the "equal protection provision of the Constitution." Justice Poff in *Rowe* calls it "the equal protection guarantee," and "equal protection of the laws." Justice Cochran in dissent in *Williams* calls it the "constitutional right to equal protection." [11]

It is also very damaging to Respondents' position that in *Williams* v. *City of Richmond,*[12] the Supreme

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[7] Brief in Opposition, pp. 20-22.

[8] *Id.*, p. 36.

[9] *Id.*, p. 28, note 46.

[10] 14 S.E.2d 287, 292 (Va. 1941).

[11] *See* Petition for Writ of Certiorari, pp. 12-13.

[12] *See* note 10, *supra.*

Court of Virginia in discussing the Fourteenth Amendment Equal Protection states:

> A classification will not be sustained however, where it is arbitrary or capricious, and rests on no substantial or reasonable basis. In *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U.S. 232, 233, 10 S.Ct. 533, 535, 33 L.Ed. 892, it is said: "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. *Id.*, 14 S.E.2d at 292.

"Discrimination," "arbitrary," "capricious" and "reasonable" are the very words which Respondents maintain dictate a reliance on state law.[13] However, here they are used by the Supreme Court of Virginia when discussing Fourteenth Amendment Equal Protection. When combined with the use of "equal protection" by Justices Cochran and Poff and the absence of the use of "equal protection" when referring to state law in the case law of Virginia, it becomes clear that the *Allman-Williams-Rowe* trilogy rely on the Fourteenth Amendment as does *Williams* v. *City of Richmond, supra.*[14]

B. Due Process

In arguing that *Allman* and *Williams* were based on State law, Respondents cite *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) and *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963),

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[13] Brief in Opposition, pp. 12, 24, 26-7.

[14] *Compare Township of Mount Laurel* v. *Southern Burlington County NAACP*, 336 A.2d 713 (N.J. 1975); *Appeal dismissed, cert. denied* 44 U.S.L.W. 3181 (U.S. Oct. 6, 1975) in which the Supreme Court of New Jersey specifically relied on state constitutional provisions.

for the proposition that this Court has taken a "hands off" attitude to the state exercise of the police power in the economic area.[15] Their reliance is misplaced.

It is noteworthy that in Section III of the Brief in Opposition, where Respondents argue for denial even assuming state court reliance on the Fourteenth Amendment, *Lincoln Federal* and *Ferguson* are conspicuous by their absence. The fundamental point in both cases is that in each this Court sustained a state legislative exercise of the police power in the economic sphere and refused to authorize judicial interference.

In the cases involved in this Petition a state legislative exercise of the police power has been overruled by judicial reliance on substantive due process. In *Lincoln Federal* and *Ferguson,* the exercise of state legislative power was protected and judicial reliance on discredited notions of substantive due process was expressly disavowed by this Court. Respondents' Brief in Opposition is corroborative of the need for a grant of certiorari in this matter. The constitutional issue is clear. Respondents contend that even assuming the presence of federal grounds, *Williams* and *Allman* are correctly decided. *See* Brief in Opposition, p. 36. This can only mean that state courts may use the Fourteenth Amendment to displace the legislative judgment even though federal courts may not.

It has been understood for a generation that the judicial abdication, at least on Federal Constitutional grounds, is to be the norm in areas such as zoning where substantive economic rights are at stake. As far back as 1962, Professor McCloskey, reviewing the trend of

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[15] Brief in Opposition, p. 18.

substantive due process cases in this Court, reached the following conclusion:

> [N]o claim of substantive economic rights would now be sustained by the Supreme Court. The judiciary has abdicated the field.[16]

The death certificate, if one was needed, for substantive due process can be found in *North Dakota State Pharmacy Board* v. *Snyder's Drug Store*, 414 U.S. 156 (1973), explicitly overruling *Louis K. Liggett Company* v. *Baldridge*, 278 U.S. 105 (1928), as being in "that vintage of decisions which exalted substantive due process by striking down state legislation which a majority of the Court deemed unwise." 414 U.S. at 164. *Snyder* adopts the Holmes-Brandeis view eschewing the use of the due process clause to subordinate legislative judgment to the judicial enhancement of private economic rights. Mr. Justice Douglas quoted in *Snyder* from *Lincoln Federal, supra*, in order to illustrate the demise of substantive due process in Fourteenth Amendment litigation:

> "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of *some valid* federal law. . . . *Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Con-*

[16] McCloskey, *Economic Due Process in the Supreme Court: An Exhumation and Reburial*, 1962 Supreme Court Review 34, 38.

> *gress and state legislatures are put in a straitjacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." 335 U.S., at 536-537.* 414 U.S. at 164-5. (Emphasis added)

In other words, this Court in *Snyder* took pains to endorse the view that the due process clause of the Fourteenth Amendment cannot be used to put state legislative power "in a straitjacket." *Snyder* makes it unmistakably clear that substantive due process as Fourteenth Amendment doctrine is dead in the state supreme courts. In this connection, it should be remembered that *Snyder* came to this Court from a state supreme court under the very same jurisdictional provision, 28 U.S.C. 1257 (3), which is the basis for jurisdiction in this case.

The issue in this case is not whether pursuant to a specific reliance on the state constitution, a state may continue to follow the doctrine of substantive due process, itself an issue not free from doubt.[17] The issue is whether or not a state court relying on the Federal Constitution may ignore Supreme Court precedents with respect to substantive due process. On this latter point, the Brief in Opposition is entirely unre-

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[17] *See* Howard, *Commentaries on the Constitution of Virginia, supra*, p. 195; "The rise and fall of substantive due process in Virginia closely parallel the corresponding evolution of judicial economic regulation in the federal courts." We note that Respondent relies on *Moore* v. *Sutton*, 39 S.E.2d 348 (Va., 1946), for the continuing vitality of substantive due process as a matter of state constitutional law. *Moore* v. *Sutton* is characterized by Professor Howard "as the last gasp of economic substantive due process in Virginia." Howard, *supra*, p. 199. *Cf.* also Sandalow, *Henry* v. *Mississippi and the Adequate State Ground, Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 201-202, quoted in the Petition for Writ of Certiorari, p. 50.

sponsive. Thus, we note that Respondent cites *Boomer* v. *Olsen*, 143 Neb. 579, 10 N.W.2d 507 (1943) on page 17 in its Brief in Opposition. In *Boomer*, the Supreme Court of Nebraska struck down the same statute under the Nebraska Constitution which this Court had held valid under the Fourteenth Amendment. *Boomer* is precedent for Petitioner, not Respondents. Unlike *Williams* and *Allman*, the *Boomer* case was an explicit, exclusive, and unmistakable example of reliance on state constitutional provisions. In *Williams* and *Allman*, no such explicit reliance, exclusive or otherwise, on state constitutional provisions can be found.

Respondent contends that this Petition is an attempt to produce a federal constitutional issue when none exists. It would be far more accurate to say, however, that Respondent is insisting on exhuming a doctrine in federal constitutional law which no longer exists, i.e., substantive due process.

This Petition for Certiorari is sought, in part, because the Virginia judiciary has refused to abdicate the field of substantive economic regulation in the areas of zoning and planning. It is Petitioner's contention that where judicial intrusion into the planning process is based on the Fourteenth Amendment, the Fourteenth Amendment is violated when judicial judgment is substituted for legislative judgment.

II. The Principles Enunciated in Allman and Williams Have the Potential for Far More than Local Effect.

A. The Effect Has Already Reached Beyond Fairfax County in Virginia.

Respondents contend that *Allman* and *Williams* have no precedential value because the cases involved isolated factual patterns in Fairfax County and involved

the actions of a particular Board of Supervisors.[18] This representation of Respondents has already been proved incorrect. The actions of two other Virginia jurisdictions in land use have been reversed on the basis of *Allman* and *Williams* citing the "discriminatory and, therfore, arbitrary and capricious" language.[19]

B. The Effects May Be National.

Respondents submit that there is little, if any, interplay between the land use and statutory construction decisions of the state courts.[20] *Board of Supervisors* v. *Carper*,[21] the case most often cited by Respondents, contradicts the former contention since it has been used as precedent in Ohio, Maryland, Massachusetts, and New Jersey.[22]

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[18] Brief in Opposition, pp. 39-44. It should be noted that the subject Board of Supervisors took office in January, 1972. Allman's rezoning was denied in October, 1971, by the previous Board. *Allman*, Appendix I, p. 4.

[19] Arlington County, Virginia—*County Board of Arlington County* v. *God*, slip op. Sept. 5, 1975; City of Fairfax, Virginia—*City Council of the City of Fairfax, Virginia* v. *Swart*, slip op., Sept. 5, 1975. Both cases are reprinted in the Appendix to this Brief.

[20] Brief in Opposition, p. 38.

[21] 107 S.E.2d 390 (Va. 1959).

[22] *County Commissioners of Queen Anne's County* v. *Miles*, 228 A.2d 450, 457 (Md., 1967); *The State ex rel. Grant Ex'r.* v. *Kiefaber* 181 N.E.2d 905, 914 (Ohio, 1960); *Brd. of Appeals of Hanover* v. *Housing Appeals Com.*, 294 N.E.2d 393, 423 (Mass., 1973); and *Oakwood* at *Madison* v. *Township of Madison*, 283 A.2d 353, 357 (N.J., 1971). Respondents also apparently disagree with their own contention, citing cases from the state courts of Pennsylvania, Florida, Alabama, Illinois, Michigan, Kansas, New Jersey, Maryland and Massachusetts in their Briefs of Appellees to the Su-

As to the latter contention—that statutory construction decisions of one state do not influence other states —the Supreme Court of Virginia has clearly shown its falsity. In *Ross* v. *County Board of Arlington County,*[23] the Virginia court used a New York case to help construe wording in the land use section of the Virginia Code.

> The wording of the Virginia and New York statutes is for all practical purposes identical. Both were evidently taken from the model "Standard State Zoning Enabling Act," which contains the provision. . . .

The Board has already shown that the zoning decisions judicially reversed in *Allman* and *Williams* were based upon the provisions of that very standard zoning act, various forms of which have been adopted by 47 states including Virginia.[24] The quotation from the Supreme Court of Virginia in *Ross* destroys Respondents argument and demonstrates the potential national impact of *Allman* and *Williams.*

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preme Court of Virginia in *Allman* and *Williams.* Respondents submitted the case law of these states as authority for their position before the Supreme Court of Virginia. It is inconsistent to argue that *Allman* and *Williams* will not likewise be used as precedent in other states.

[23] 87 S.E.2d 794, 795 (Va. 1955).

[24] Petition for Writ of Certiorari, pp. 56-60.

CONCLUSION

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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